

EX PARTE OR LATE FILED

ORIGINAL

DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

DOCKET FILE COPY ORIGINAL

J.G. HARRINGTON

DIRECT DIAL 202-776-2818
jharrington@dlalaw.com

WASHINGTON, D.C.

1200 NEW HAMPSHIRE AVENUE, N.W. • SUITE 800 • WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 • FACSIMILE 202-776-2222

ONE RAVINIA DRIVE • SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901 8800
FACSIMILE 770-901 8874

May 7, 1998

RECEIVED

MAY - 7 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Iowa Communications Network Request for Determination
CC Docket No. 96-45
AAD/USB File No. 98-37
Written Ex Parte Presentation

Dear Ms. Salas:

I am writing on behalf of our client the Iowa Telecommunications and Technology Commission, operating the Iowa Communications Network (collectively, the "ICN"), to respond to recent *ex parte* submissions in this matter by the United States Telephone Association ("USTA"), the National Telephone Cooperative Association ("NTCA"), the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") and Minnesota Equal Access Network Services, Inc. ("MEANS"). These submissions purport to distinguish the legal authority provided to the Commission by ICN in this matter and argue that certain characteristics of ICN's service offerings that also are characteristic of offerings by other carriers nevertheless transform ICN into a private carrier. As shown below, these claims are without merit and ICN's petition should be granted promptly.^{1/}

^{1/} In its April 13, 1998, submission, NTCA also implies that the Commission should not grant ICN's request because ICN is seeking reconsideration of the Commission's *Fourth Order on Reconsideration*, but this argument plainly is without merit. ICN does not seek a change in the Commission's rules, but only a recognition that the rule governing "state telecommunications networks" does not apply to an entity that meets the definition of "telecommunications carrier." Even if the Commission were to agree that the rule applies to ICN, it could determine that a waiver is warranted on the basis of the facts in this proceeding and the significant public interest harms to Iowa schools and libraries that would accrue if ICN's services were not eligible for universal service support. See ICN Reply Comments at 2-4.

No. of Copies 1000
List ABCDE

042

First, the cases provided to the Commission by ICN, and the case law generally, plainly support the conclusion that ICN qualifies as a common carrier. Under even the most restrictive definition adopted by the courts or the Commission, a common carrier is permitted to determine that it will carry some types of traffic and not others. These cases establish that a carrier can exclude customers who could use that carrier's services if those customers are not of the type normally served by the carrier or seek to have the carrier carry traffic of a type different than normally is carried, even if the carrier is capable of serving such customers. Thus, in *Mobilefone*, an company that provided paging service only to physicians was a carrier, even though the company could have provided paging service to others, and, in *Rosenstein*, a company that only carried movies from one theater to another was a carrier even though the company's truck obviously could have carried other small parcels.^{2/} Similarly, Comsat and Amtrak are carriers despite specific statutory limitations that forbid them from carrying traffic they otherwise are suited to carry. It does not matter that Amtrak's trains could carry fruit, but do not, or that Comsat could serve end users, but does not – each is still a common carrier.^{3/}

Commission precedent also is consistent with this conclusion. For instance, channel service was available only to a very limited group of customers, that is, franchised cable operators providing cable service.^{4/} Similarly, the Commission historically has authorized a wide variety of special purpose services that were aimed at and available to only a limited clientele,

^{2/} *Mobilefone of Northeastern Pennsylvania, Inc. v. The Professional Service Bureau of Luzerne County, Inc.*, 54 Pa. P.U.C. 161 (1980); *State Bd. of R.R. Comm'rs v. Rosenstein*, 252 N.W. 251 (Iowa 1934).

^{3/} USTA suggests that Amtrak and Comsat are carriers only because their statutes say they are and that ICN is not a common carrier because its statute does not say it is. USTA at 9-10. While the statutory language governing Amtrak and Comsat is dispositive of their status, that language merely demonstrates the Congressional understanding that entities with an obligation to serve their designated customers are common carriers. In ICN's case, its statute embodies an obligation to serve all eligible customers indifferently. That, of course, is the *sine qua non* of common carriage and no further statement on the part of the Legislature is necessary.

^{4/} USTA appears to believe that channel service is somehow different from ICN's services because ICN "is legally barred from serving all but narrowly defined classes" of customers. USTA at 14. That, of course, was the salient characteristic of channel service: the Commission's rules allowed local exchange carriers to provide that service only to the "narrowly defined" class of franchised cable operators, a class that rarely exceeded one customer per franchise area. ICN's distance learning services, by comparison, are available to every school, public or private, K-12 or higher, in the state.

Magalie Roman Salas, Esq.

May 7, 1998

Page 3

including television transmission services such as those described in the earlier ICN *ex parte*.^{5/} In other words, a carrier is entitled to choose the class of customers it will serve and the services it will provide, so long as it does not individually negotiate with the customers within that class or choose to serve some members of the class and not others.

In light of these cases, ICN could be a common carrier even if it chose to exclude entities that could use its services from its customer base. The record shows, however, that ICN offers both its distance learning and telemedicine services to all who are capable of using them. The arguments of USTA, NTCA and others to the contrary are based on a misunderstanding, intentional or otherwise, of the nature of these services.

ICN's distance learning service, for instance, is not merely the provision of a high speed circuit between two locations or even a relatively simple bridged video conferencing arrangement. ICN's distance learning services are based on SONET delivery systems and use specially designed switches with high-speed video switching capabilities to eliminate video and sound delays. The network is capable of connecting 100 or more classrooms simultaneously at high quality. Moreover, the facilities are optimized for educational purposes. Similarly, ICN's telemedicine services include special bandwidth management features that permit variable bandwidth and simultaneous, synchronous transmission of video and medical data. This network management system is a critical component of the telemedicine service offering and, again, distinguishes it from the mere provision of a high speed circuit.

Because these services are so specialized, there is no practical difference between the entities that are permitted to use them under Iowa law and the entities that would want to purchase them. As ICN has described, all education providers, public and private, are eligible to purchase distance learning service, and telemedicine services are available at any location where

^{5/} USTA cites a series of cases in which entities sought to be treated as private carriers or non-carriers to support its arguments. USTA at 12. These cases are irrelevant for a variety of reasons, but most notably because each case involves either an entity that provides facilities rather than services (such as satellite transponder leases) or that negotiates individual arrangements with its customers. ICN fits neither of these profiles. USTA and NTCA also both misconstrue the nature of the various Section 214 cases cited by ICN. USTA at 10-12, NTCA at 2-3. In each of these cases, the carrier was authorized to provide only a specific, restricted service, such as service to Australia, telex service to a specified nation or television transmission service from a specified point. These cases all establish that an entity that provides a very limited range of services can be a common carrier.

Magalie Roman Salas, Esq.

May 7, 1998

Page 4

doctors work.^{6/} Thus, as a practical matter both distance learning and telemedicine are available to the entire portion of the public that can use them. Even if they were not, however, the case law firmly establishes that ICN only need serve a specified clientele indifferently to qualify as a common carrier. In light of these facts, the Commission plainly should defer to the judgment of the Iowa Utilities Board, the expert agency in Iowa, which has concluded that ICN is a common carrier.^{7/}

Moreover, ICN simply does not have the characteristics of a private carrier. Its customers are determined by its governing statute, not by the ICN itself. Under that statute the Legislature designated broad classes of potential customers and required the ICN to serve all of the members of those classes, a point that no party disputes. Indeed, the need for special legislation to change the classes served by the ICN demonstrates that ICN does not pick and choose its customers.^{8/}

ICN also does not individually negotiate terms and conditions, as it previously has demonstrated. The waiver procedure described in USTA's filing does not operate as a mechanism for negotiation because ICN has no power to negotiate. In effect, if an ICN customer obtains better terms and conditions elsewhere, ICN grants a waiver and the customer moves to another carrier.^{9/} ICN does not even have the power to match the other carrier's offer, even

^{6/} While USTA suggests that the requirement that ICN users transmit material that "is consistent with the written mission of the authorized user" is inconsistent with common carriage, that plainly is not the case. Common carriers routinely restrict the purposes for which their services may be used. The most obvious examples are the restrictions that prevent businesses from purchasing residential service. Similarly, channel service was made available only for the provision of cable service and pay-per-call service tariffs typically prohibit customers from offering services that carriers find "objectionable," a far more subjective standard than the standard that ICN applies.

^{7/} While USTA cites Iowa case law on the issue of what constitutes a common carrier, those cases do not contradict the IUB's earlier conclusion in any way. USTA at 13. At most, those cases establish that, at the far fringes of common carrier jurisprudence, there are some disagreements regarding the nature of common carriage. For instance, in *Wright* the train operator was not in the regular business of providing passenger train service. *Wright v. Midwest Old Settlers and Threshers Association*, 556 N.W.2d 808 (Iowa 1996). ICN, on the other hand, is in the business of providing communications services.

^{8/} See USTA at 14-5.

^{9/} As described in ICN's reply comments in this matter, ICN has never turned down a
(continued...)

Magalie Roman Salas, Esq.
May 7, 1998
Page 5

though it is well established that carriers can alter their prices to meet competition, because ICN's rates are set on an annual basis and cannot be changed for any one customer.^{10/}

USTA, after a cursory review of ICN's web site, also argues that ICN cannot be a common carrier because it offers varying prices to different classes of customers.^{11/} Initially, this claim fails to recognize that the prices quoted include specific, separately-funded subsidies for Iowa schools, a fact which previously has been described to the Commission. At the same time, USTA's argument is highly disingenuous because it is a common practice for carriers to charge different classes of users different amounts for similar service. Again, the most common example is residential service, which is functionally equivalent to business service but generally is less expensive. Similarly, access customers and end users are subject to different charges for similar services. The key issue in determining whether a service is being offered on a common carrier basis, however, is not whether some groups of users pay different amounts, but how those amounts are determined. Only if the rates are negotiated individually is the entity a private carrier. If, as is the case in Iowa, the rates are based on a rate schedule that applies to all users in the defined class, then the service is a common carrier service.^{12/}

Finally, the public interest continues to support grant of the ICN request. As ICN previously has described, the most significant effect of denying the request will be to prevent Iowa schools and libraries from obtaining universal service support that is available to schools and libraries in every other state and, indeed, to discriminate between groups of Iowa schools. While MEANS argues that grant of the ICN request will result in undue pressure on Iowa

(...continued)

waiver request under this statutory procedure. In any event, schools, libraries and telemedicine users do not require a waiver to change from ICN to another service provider. See ICN Reply Comments at 8-9.

^{10/} See ICN Reply Comments at 16. USTA appears to argue that the waiver process constitutes individual negotiation because different customers can purchase different packages of service. USTA at 15-6. This, of course, is true of the relationship between every common carrier and its customers. No carrier that offers multiple services is constrained to offer its customers a single, unalterable package of services. In any event, the critical element of ICN's relationship with its customers is that it cannot change the terms under which any service is purchased by an individual customer because ICN is forbidden by law from doing so.

^{11/} *Id.* at 15.

^{12/} USTA does not dispute that every user within the classes it describes is charged the same amount. *Id.*

Magalie Roman Salas, Esq.
May 7, 1998
Page 6

schools to use ICN services, there is no evidence for that claim.^{13/} As a matter of law, Iowa's school funding formulas do not permit any discrimination based on whether a school uses ICN's services, uses another carrier's services or chooses not to purchase any advanced services. The evidence in Iowa also shows that the concerns raised by MEANS do not arise in practice, because many schools have chosen not to participate in the ICN and some schools even use alternative vendors for the services that ICN provides. In any event, this theoretical concern cannot possibly outweigh the significant public interest benefits to Iowa schools and libraries from a determination that ICN's services are eligible for universal service support.

In accordance with Section 1.1206 of the Commission's Rules, the original and two copies of this presentation are being submitted to the Secretary's office on this date. Please inform me if any questions should arise in connection with this submission.

Respectfully submitted,



J.G. Harrington

JGH/vll

cc: Hon. William E. Kennard
Hon. Susan Ness
Hon. Harold Furchtgott-Roth
Hon. Michael K. Powell
Hon. Gloria Tristani
Thomas Power
James L. Casserly
Kevin J. Martin
Paul A. Jackson
Paul Gallant
A. Richard Metzger, Jr.
Valerie Yates
Ruth Milkman
Lisa Gelb
Irene Flannery

^{13/} MEANS at 2-3. The MEANS argument also suggests that any government-owned carrier should be ineligible for universal service funding, which would be contrary to the requirements of Sections 214(e) and 254.